Filed 3/30/10 P. v. Norra CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DEANDRE NORRA, Defendant and Appellant.	A124804 (Alameda County Super. Ct. No. CH45618)

Deandre Norra (appellant) appeals from a judgment entered after a jury found him guilty of carjacking (Pen. Code, § 215, subd. (a)[1]) and personally using a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). He contends his conviction must be reversed because the trial court abused its discretion in requiring the jury to continue deliberating after the jury twice informed the court that it was deadlocked, and violated his constitutional right to due process by coercing the jury to reach a verdict. Alternatively, he contends that if he forfeited his claim, he was denied effective assistance of counsel. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 8, 2008, an information was filed charging appellant with carjacking (§ 215, subd. (a)) and the personal use of a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). At a jury trial that began on March 16, 2009, Raymond Catone testified that at about 5:45 p.m. on August 29, 2008, he was pumping gas into his Pontiac Grand Prix (the

[1] All statutory references are to the Penal Code unless otherwise stated.

Pontiac) at a gas station in San Leandro. He noticed two people nearby in an older model, green, four-door Mercedes (the Mercedes). After paying for the gas, Catone returned to his car and was opening the driver's side door when one of the people, whom he identified in court as appellant, approached him with a question. As Catone replied, appellant pulled up his shirt to reveal a semiautomatic pistol in his waistband, told Catone to back up, got in the driver's seat of the Pontiac, and yelled, "Where are the keys?" Catone told appellant the key was in one of the cup holders. Catone's cell phone, a T-Mobile Sidekick phone, was also in the cup holder. Appellant drove away in the Pontiac, and the Mercedes also left the gas station. Someone "flagged down" a passing patrol car, and Catone and San Leandro Police Officer Mark Clifford drove around looking for the Pontiac or the Mercedes. After about ten minutes, Catone spotted the Mercedes in a parking lot of an apartment building located on Tropic Court (Tropic Court apartments).

Catone further testified that on August 29, 2008, appellant had short hair and "gold teeth on the top four teeth of his mouth. It was open-faced, which means there's gold around it, and you could see the teeth through the gold." Appellant also had a distinct nose and some facial hair around his mouth. Catone testified that the man who drove away in the Mercedes was "a black male, darker skin [than appellant's]. He had messy twisties. It was short. And he had on a black hooded sweatshirt." The day after the carjacking, Clifford showed Catone a photo lineup. Catone did not see the person who carjacked him but circled a photograph of a man who "generally looked like" the man who drove away in the Mercedes, and was also "the closest one that that looked like the man" who carjacked him. Later, San Leandro Police Detective Tai Nguyen showed Catone a second photo lineup. Catone "immediately" pointed to appellant's photograph and told Nguyen "it looked just like" the man who carjacked him.

Appellant's half sister, Teandra Butler, testified that on August 29, 2008, she was living in the Tropic Court apartments. On September 7, 2008, she was in her green Ford Explorer (the Ford) with her mother and uncle when a San Leandro police officer stopped the car. During the stop, the officer removed a cell phone from the Ford. Butler testified that the first time she saw the phone was on September 6, 2008, when she went to San

Francisco in the Ford with her uncle, appellant, and her friend Ashley Williams. Williams had the phone in her hand, and she later told Butler that she had purchased it from someone from the Tropic Court apartments. Butler further testified that Williams owned a green or gray Mercedes and that Butler allowed Williams to store the car at the Tropic Court apartments. She testified the car was at the Tropic Court apartments on August 29, 2008. She also testified that appellant, who worked as a mechanic, had repaired Williams's car before. Butler testified that appellant appeared the same in court as he had in August 2008, including his "closed-faced teeth," which means "[y]ou can't see the teeth. It's just all gold." She testified appellant has never worn an "open grill." Butler further testified that appellant borrowed the Ford on August 29, 2008, because he was moving his belongings to his new residence and to a storage facility. Butler saw appellant loading things into the Ford on August 29, 2008.

Clifford testified he showed Catone a photo lineup the day after the incident. Catone said the suspect was not in the lineup but pointed to a photograph of a man named Andre Flippin and said, " 'this person looks most like the subject . . . but it wasn't him.' " Clifford further testified he stopped a Ford Explorer on September 7, 2008, in which there were several passengers including Butler. During the stop, Clifford retrieved a black hoodie and a T-Mobile Sidekick phone from the car. Butler was sitting closest to the phone.

San Leandro Police Officer Curt Barr testified he was dispatched to the parking lot of the Tropic Court apartments some time after 6 p.m. on August 29, 2008. He collected three fingerprints from the Mercedes—one from the rearview mirror, one from the outside of the driver's door by the handle, and one from a GPS unit inside the car. Denise Cowan, a property evidence technician for the San Leandro Police Department, testified that all three fingerprints matched appellant's fingerprints.

Ashley Williams testified she owns a 1987 Mercedes Benz that is "a four-door, sedan-type car, silverish green in color." She testified she never left her car at the Tropic Court apartments and did not know it had ever been parked there until she learned from the police on August 29, 2008, that it had been towed from that location. She testified

appellant had done some work on her car in August 2008 but she had no knowledge of him working on it at the Tropic Court apartments. No one else had permission to drive her car. Williams further testified that about a week or two after August 29, 2008, she went to San Francisco with appellant, Butler and appellant's uncle in Butler's car. When Williams opened the door to get inside the car, she saw a cell phone on the seat. The phone was not hers, but she told a police detective that it was because appellant told her to do so. A few days later, she saw the same phone on a dresser, a few inches away from appellant's keys. Williams testified that appellant looked the same in court as he did in August 2008, including the same "closed grill" teeth that are completely covered and "cemented in."

Deputy District Attorney Suzanne Simpkins, who appeared at the preliminary hearing on behalf of the People, testified about appellant's testimony at that hearing. According to Simpkins, appellant testified that on August 29, 2008, he drove the Ford to a storage facility four or five times and was there until about 5:55 p.m. or 6 p.m. He had rented the storage space in his name and both his entry and exit required keying in a code number. Appellant also testified at the preliminary hearing that he was not a driver or passenger in the Mercedes on August 29, 2008.

An on-site property manager of the storage facility testified that records showed appellant was a customer and had used his code to enter on August 28, 2008, but had not used it to exit. When asked how he could have used his code to go in but not when leaving, the property manager testified, "someone was on the property leaving, and he could have followed them out rather than stopping and putting his code in." The records showed appellant did not use his code on August 29, 2008.

San Leandro Police Detective Tai Nguyen testified he was assigned to investigate a carjacking that occurred on August 29, 2008. During the investigation, he learned that Catone's cell phone was also taken at the time his car was taken, and that the police had recovered the phone from Butler's car. Nguyen spoke to Williams, who said she bought the phone from someone at the Tropic Court apartments. Nguyen placed Williams under arrest for being in receipt of stolen property, advised her of her *Miranda* rights, and

booked her in jail. The next day, Williams asked to speak to Nguyen and told him she first saw the cell phone on top of a shelf or bookcase in appellant's room. She said she had claimed the phone was hers because appellant and Butler told her to do so. Nguyen testified that after the conversation with Williams, he showed Catone a photo lineup that included appellant's photograph. Catone "immediately" selected appellant's photograph and said, "number 2 is the guy with the gun. It looks just like him. Damn." Nguyen testified that appellant's fingerprints were never found in the Pontiac or on the cell phone.

Ik Jae Chung, a maker of gold teeth, testified that appellant wears a "six top grill" with "split open face," which means the gold completely covers the center top four teeth and covers most of the two "fangs" or canines. Chung could not tell by merely looking at appellant whether appellant's grill was permanent or removable.

Natosha Norra, appellant's sister, testified that appellant's appearance in court was very similar to his appearance in August 2008. Norra testified she saw appellant moving items on August 28, 2008, and that the house in which appellant had lived was emptied as of August 30. Appellant's mother testified that appellant looked similar in court to the way he looked in August 2008. She testified appellant finished moving before August 30. She also testified she went with appellant to get his gold teeth and that he had "some stuff" put in "where it won't come out. He never take[s] them out." Appellant's girlfriend testified appellant looked "pretty much the same" in court to the way he looked in August 2008, including his close grill teeth. She testified appellant brought some of his belongings to her place between 5 p.m. and 6 p.m. on August 29, 2008.

The jury convicted appellant as charged, and the trial court sentenced him to 19 years in state prison.

DISCUSSION

Appellant contends the trial court abused its discretion in requiring the jury to continue deliberating after the jury twice informed the court that it was deadlocked, and violated his constitutional right to due process by coercing the jury to reach a verdict. We reject the contention.

Background

Jury deliberations began at about 2 p.m. on March 23, 2009, and the jury sent out notes at various times. On March 25, 2009, in the presence of the jury, the court set forth what had occurred: "This morning, I'd say mid-morning some time, we received a note signed by our foreperson, Juror Number 1, who, apparently, is a man of few words. The note reads, 'Hung.' One word. [¶] After receiving this note, I sent the bailiff back in to simply say, 'Keep working at it,' and you did, apparently. [¶] And then about ten minutes to noon, somewhere right around there, I got the next note in a very—in similar fashion. It reads in a word, 'Hung.' So there we are. [¶] And I sent word back in to you at that time that I was going to send you to lunch, and we would deal with it after lunch." The court stated that all exhibits except the recordings and several read backs had been provided to the jury during deliberations. The court then asked the foreperson: "Is there any other help that we can provide, either in the form of, perhaps additional testimony that might be reread to you, either that which you've heard already or maybe some additional testimony of witnesses that testified during the trial, or are there some issues about the law that might cause you to have questions of me, something that you might need cleared up about the law, anything that you could think of that I could do or we could do to assist you in your deliberations?" The foreperson replied, "No, sir." In response to further questions by the court, the foreperson stated the jury took its first vote at 11:30 a.m. that day and had not taken any other votes.

The court continued, "All right. I'm not going to ask you what the result of the vote was at this point. As I told you in the instructions I gave you before you went out to deliberate, . . . while each of you has to decide the case for yourself, you reach your own individual conclusions about what the evidence proves or doesn't prove, you should do so after a thorough discussion with all the other jurors. And the reason for that is obvious, so you all have an opportunity to share your views about the evidence for the benefit of everybody else on the jury. So when each of you reaches your individual conclusion about what the evidence shows or doesn't show, you're able to do that after having listened to and considered the views of all the other jurors, so you get the benefit of the

thought processes of everybody before you reach your own conclusions. And it's really important, therefore, that everybody participate in this deliberative process." The court asked whether everyone had an opportunity to share their views about the evidence, and the foreperson responded, "Yes. They have twice. Once yesterday, and once today." The court started to ask, "Does that mean that you sort of, in a sense, went around the table and everybody—," and the foreperson stated, "Everybody had a turn to speak and say anything they wanted, as long as it was about the case."

The court continued, "Here's what I've found. I've been doing this for quite some time, and I've learned that it's not at all uncommon—I shouldn't make it sound like it's an everyday thing, but I've learned, I've seen on more than one occasion, on a number of occasions, that a jury which initially . . . reported that it's unable to reach a verdict has ultimately been able to do so. It's easy to get hung up, to get stuck at some point, and then without a sense of, what new can we try, what else can we try in an effort to reach a decision? And sometimes, maybe it's just a new approach, new ideas about how to approach the subject that could be helpful. So I want to throw some ideas at you. [¶] What I'm going to end up doing is ask you to go back and keep trying. I'm going to start there, but I'm going to throw some ideas at you. As I mentioned, sometimes maybe a different approach is helpful. One thing you might consider, and I am by no means going to tell you how to conduct your deliberations. That's for you to decide. And given your 12 personalities, what you need to find is what works best for you, so one thing you might consider is to have different people lead the discussions. I know you've selected a foreperson whose responsibility it is to lead the discussion, or at least keep the discussion moving. You might try having different people lead the discussion. See if they might do it—conduct the discussion in a different way, organize it a little differently, and see if that ends up being productive in some way; that's one thought. [¶] Another thought or something you might try as a way to generate some additional discussion that you may not have had is to try reverse role playing, which is sometimes difficult for people to do. Sometimes it could be rather productive. And what I'm talking about here is perhaps having individuals give—take the opposite position that they've been taking, and get up

and talk about why perhaps the things that might lend itself to a different conclusion. Doing reverse role playing is a way perhaps to help people understand better what other people are saying that they've been disagreeing with. It might, on the other hand, help other people as they're listening to them take a different view of the way they've been looking at the evidence. [¶] I'm not necessarily suggesting this would work for you folks, but it's just an idea. There may be other ideas that you could come up with for a new way to approach your discussions that might just be productive. It doesn't change the law, it doesn't change what the evidence is, it may just be a matter of how you're approaching the case and your discussions, and how good a job those discussions you're doing of bringing out everybody's thoughts about the evidence. [¶] What I'm going to do, and I appreciate this, the fact that this is frustrating for you, and this isn't exactly what you want to hear from me, but I just want to know that you folks have given it—truly given it your best shot and have exhausted every change, you had every opportunity you had to fully vet this case and try to reach a decision, so I'm going to send you back in there, and I'm going to ask you to consider the things that I suggested, and also see if there are some other ideas that you may have or a new way to approach this in an effort to reach a decision. [¶] So far I haven't asked anything about where you stand because I don't want to know that at this point, but I would like you to at least go in, talk about some ideas, about what might help better discussions, how you might change discussions, anything you might do to make it a little different, to see if a different approach would help, and see if you've got—if you find something that may be worth trying. Give it a try. [¶] If you folks, after talking about it, feel there really isn't any other approach that's going to help that might be your conclusion, then let me know that as well, but I am going to ask you to keep working at it, to try some new ideas to see where it goes. I'm not going to just basically keep you folks locked up in that room indefinitely until you reach a verdict, but by the same token, what I've found is, it is true sometimes, jurors, they just get—they hit a plateau, they don't feel like they could move forward, and with a little pushing, they often do. So I just want to make sure we haven't exhausted that possibility as well. [¶] So with that, I'll send you back in there, ask you to talk about it,

see what you can come up with for some ideas on how to approach it that might be helpful, and then we'll wait to hear from you."

The court asked if its comments suggested other areas on which the jury would like guidance and asked, "Have you folks talked about this? 'Maybe the judge would be able to give us an idea about something,' or you're not at that point?" The foreperson answered, "We haven't gotten there." The court suggested, "You might also consider the question, is there anything that I could do to help in any way regarding the evidence or the law, if there is any questions about that that I might be able to help in any way, so just think about what you might be able to do to keep this moving forward, and we'll wait to hear from you."

The jury resumed deliberations. Defense counsel moved for a mistrial on the ground that the two jury notes reading "Hung" were a clear indication of a "hopelessly deadlocked jury." The court denied the motion, stating, "This may end up a mistrial, but the request to declare a mistrial, at this point in time, is denied." The court asked, "Got any issues with what I said to them?" Both defense counsel and the prosecutor responded, "No." The court continued, "All right. I just think it's premature. All I've gotten is two notes. . . . This is the first time I talked to them since we got these two notes. They came in relatively rapid succession. I would say within about an hour-and-a-half of each other. I find it curious, when they sent the first note, they had never taken a vote. They sent the second note after having taken only one vote."

About half an hour later, the jury sent out another note with numerous questions. In the presence of the jury, the court observed the note was "obviously a group effort" written in several different handwritings. The note asked for an explanation of reasonable doubt as opposed to possible or imaginary doubt and for a definition of the term circumstantial evidence. In response, the court reread CALCRIM Numbers 220, 223 and 225 relating to reasonable doubt and circumstantial evidence. The next question read, "Fingerprint missing (why and how come we haven't rec'd print info on Pontiac and phone) May we have . . . print experts testimony? ([A]bsen[ce] of [p]rints.)" The court stated, "Number one, the evidence is in. You must decide the case based on the

evidence that has been presented." The court also stated, "On the question of fingerprints, what do you have, and what don't you have? There has been testimony regarding recovery of fingerprints from the green Mercedes, and there has been testimony from an expert witness regarding a comparison of those latent prints from the green Mercedes with some known prints. . . . There's been no testimony regarding an evidence technician examining Mr. Catone's car for prints. There's been no testimony regarding an examination of the cellphone for prints, and there's been no testimony from an expert regarding comparing any such latent prints with any known prints. So there's an absence of evidence from either an evidence technician or an expert regarding fingerprints or lack of fingerprints on those items. [¶] The sole testimony that you've heard regarding those subjects came in the context of [a] recorded interview of Ashley Williams, as you may recall, and the testimony of Detective Nguyen following you hearing one of those recordings. And the attorneys and I were talking about this, and they've approved me making direct reference to these. [¶] The testimony you have is that you recall in the Ashley Williams interview, one or more of the detectives told Ms. Williams that Mr. Norra's prints were found in the victim's car. You will also, hopefully, recall that [the prosecutor] then asked Detective Nguyen, "When you told Ms. Williams that, was that true?" [¶] And Detective Nguyen said, 'No, that was not true. We did not have Mr. Norra's prints from the victim's car.' [¶] That's the extent of the testimony you have regarding the subject of prints on anything other than the green Mercedes. So that's what you have to work with. [¶] And now we go back to that question, can you get testimony regarding that? No. You gotta work with what you have. [¶] Okay. What if lack of any other evidence regarding prints, what affect that has on your conclusions about the case is up to you. Whatever conclusions you're able to draw based on the absence of that evidence is totally up to you folks, but that's the evidence as it stands."

The note also asked, "Could we get a reading of the preliminary trial. What extent do we have in asking for additional information or evidence?" The court stated it could not provide the jury with a transcript of the preliminary hearing "because that's not in evidence." The court also stated, "We're stuck with the evidence that we have. That's

what you have to work with. . . . The question is, based on the evidence that's presented, what you're given to work with, does that evidence prove the charge is true beyond a reasonable doubt or fail to? That's the question. So I go back to that principle. So you've got to decide based on the evidence you have."

The last question on the back of the note ("How can you help") prompted the response that the court was limited to responding to the jury's "requests for help, whether it be in the form of read back of testimony, further instructions, or explanation of the law . . . because it's not for me to be a participant or an influence in any way on how you conduct those deliberations." The foreperson confirmed that all of the questions on the note had been correctly interpreted by the court. The jury then resumed deliberations.

The court asked if either counsel had anything to state in view of its remarks to the jury. Defense counsel responded, "Nothing further, your honor . . . [¶] No objections. I thought it was perfectly appropriate." The court asked if it had left anything out that should have been said. Defense counsel responded, "this may be redundant as far as your communicating with the jury, but there was also a question when I cross-examined Officer Nguyen where I stated in a leading fashion, 'you never did get any fingerprints of Deandre Norra off of Mr. Catone's Pontiac vehicle, did you?' [¶] And I believe his answer was, 'No, we didn't.' " The court stated, "I'm sorry. I wasn't aware of that. I didn't remember that. And you didn't mention that before I brought them out. [¶] The record should reflect we did talk about this, and [the prosecutor] brought it to my attention something I did remember, his redirect of . . . Detective Nguyen, and I went and found it on the court reporter's laptop. You didn't mention that to me, or I would have looked for it as well. I think it's not much different from what I told them. Would you agree?" Defense counsel responded, "I agree." The court sated, "And besides that, I told them, 'You're stuck with what you've got. We can't give you anything else.' "

Midday on March 26, 2009, trial recessed until March 30, 2009. On March 30, 2009, the jury requested and heard a read back of Catone's testimony. The jury returned a guilty verdict that afternoon.

b. Discussion

A jury "cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, . . . unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (§ 1140.) "Whether the jury has had sufficient time to deliberate, and whether there is no reasonable probability of a verdict, are determinations committed to the sound discretion of the trial court. [Citations.]" (*People v. Price* (1991) 1 Cal.4th 324, 467.)

The leading California case dealing with coercive statements to a deadlocked jury is *People v. Gainer* (1977) 19 Cal.3d 835, 842 (*Gainer*), which condemned the "*Allen* charge," an improper instruction intended to dislodge a deadlocked jury.[2] In *Gainer*, the trial court told the " 'dissenting juror' " to " 'consider whether a doubt in his or her own mind is a reasonable one' " (*id.* at p. 848) and stated "the case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury must be selected, and there is no reason to suppose the case will ever be submitted to twelve men or women more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other." (*Id.* at p. 841.) *Gainer* concluded the statements were improper and held it is error to give an instruction to a deadlocked jury that "either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." (*Id*. at p. 852, fn. omitted.)[3]

Here, the trial court did not abuse its discretion in instructing the jury to continue deliberating. Defense counsel argued below that the two notes that read "Hung" showed the jury was "hopelessly deadlocked." However, before the jury sent out the notes, it had

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[2] The case from which the instruction takes its name is *Allen v. United States* (1893) 150 U.S. 551.

[3] *Gainer* also indicated in dictum that an instruction referring to the expense and inconvenience of a retrial was erroneous. (*Id.* at p. 852, fn. 16.)

spent time seeking information and hearing read backs, and each juror had only had two opportunities to speak about the case and one opportunity to vote. When asked whether there were other areas on which the jury might like guidance from the court, the foreperson acknowledged, "We haven't gotten there." Appellant suggests that further deliberations were unnecessary because the trial was short and "the only issue was the identity of the carjacker." However, the deliberations in this case were not particularly protracted. Over one dozen witnesses testified over the course of several days about various issues relating to identity, including appellant's alibis, the difference between open face and close face grills, fingerprints, the possible driver of the Mercedes, records from a storage facility, and the stolen cell phone. From the perspective of the jury, which submitted many requests and questions, the case was not one that could be decided quickly and easily. The court properly exercised its discretion in sending the jury back for further deliberations.

Appellant also claims the court violated his right to due process by making statements to the jury that coerced it to reach a verdict. He forfeited this claim by failing to object below.[4] (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1038 [a due process coercion claim was forfeited by defense counsel's failure to object]; *People v. Cain* (1995) 10 Cal.4th 1, 55 [claim that the trial court directed the verdict by its remarks upon reconvening the jury after a partial verdict was forfeited by the defendant's failure to object].) In any event, the claim fails on the merits, as we see nothing in the court's remarks that could be taken by a reasonable juror as coercing a verdict. Unlike in *Gainer*, the court here did not tell minority position jurors to reconsider their votes in light of the opinion held by the majority, nor did it instruct any jurors to change their positions in order to reach a verdict. It did not suggest at any time that the case would have to be retried or that a verdict should be reached for the sake of expediency. Appellant asserts that "the judge's . . . speech about trying role playing to encourage

[4] Defense counsel moved for a mistrial on the ground the jury was "hopelessly deadlocked," but did not object to the trial court's statements to the jury, and in fact, stated they were "perfectly appropriate."

further discussion could only have been understood as an instruction to the minority jurors to change their individual opinions so the jury could produce a verdict." However, the court's statements encouraged *all* jurors, without mention of the existence of a majority or minority faction on the jury, to "participate in this deliberative process" and "reach[] [their] own conclusion[s] about what the evidence shows or doesn't show."

Appellant also asserts that the court's statement, "but I am going to ask you to keep working at it," and its comment that jurors sometimes need "a little pushing," were coercive because they indicated that "not reaching a verdict was simply not acceptable to this judge." As noted, the court stated, "If you folks, after talking about it, feel there really isn't any other approach that's going to help that might be your conclusion, then let me know that as well, *but I am going to ask you to keep working at it*, to try some new ideas to see where it goes. I'm not going to just basically keep you folks locked up in that room indefinitely until you reach a verdict, but by the same token, what I've found is, it is true sometimes, jurors, they just get—they hit a plateau, they don't feel like they could move forward, and with *a little pushing*, they often do. So I just want to make sure we haven't exhausted that possibility as well. [¶] So with that, I'll send you back in there, ask you to talk about it, see what you can come up with for some ideas on how to approach it that might be helpful, and then we'll wait to hear from you." (Italics added.) We do not agree with appellant that these statements were coercive. Rather, they show the court wished to provide the jury with an opportunity to try different approaches and have further discussions before deciding it had reached an impasse. The court's direction to continue deliberations "could only have been perceived as giving jurors an opportunity to enhance their understanding of the case, rather than as pressure to reach a verdict." (See *People v. Pride* (1992) 3 Cal.4th 195, 266.) The fact that the jury continued deliberating after the weekend, sent two more notes, and heard additional read back before returning its verdict shows its "determination was the product of its own reasoning processes, not judicial coercion." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255.)

Finally, appellant asserts the court's statements were inappropriate because they indicated to the jury that it was "stuck" with the evidence presented and that it "must

reach a verdict and do so on the sole basis of the evidence presented, not insufficiency of the evidence." He points out that the court instructed the jury to "consider all the evidence" and to decide the case based "on the evidence presented," rather than on "the evidence missing from trial." However, "[a]fter a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case *based on the evidence* while keeping an open mind and talking about the evidence with each other." (Cal. Rules of Court, rule 2.1036(a), italics added.) The court also properly instructed the jury that it could not hear or obtain evidence that was not presented at trial, such as additional expert testimony or the transcript from the preliminary hearing. The court did not misstate the law or coerce the jury into reaching a verdict.

Appellant also notes that the court, in summarizing the fingerprint evidence, left out evidence that his fingerprints were not found on the cell phone, thereby leading "juror[s] harboring a reasonable doubt on this basis . . . [to] believe[] the court was instructing the jury not to take lack of evidence into account . . . ." The parties, however, approved the court's comments and its specific reference to Nguyen's testimony on direct examination that appellant's fingerprints were not found on the Pontiac. Although defense counsel later recalled and informed the court that there was additional testimony from Nguyen on cross-examination that appellant's fingerprints were not found on the Pontiac, when the court asked, "I think it's not much different from what I told them. Would you agree?" he responded, "I agree." Appellant therefore forfeited this claim. Even if there was no forfeiture, however, we conclude there was no error, and that any error was harmless.

Article VI, section 10, of the California Constitution permits the court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." The purpose of this provision is to allow the court "to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict. [Citations.]" (*People v. Cook* (1983) 33 Cal.3d 400, 407, overruled on other grounds in *People v. Rodriguez* (1986) 42 Cal.3d

730, 765-770 [court may comment on the evidence when the jury has indicated a deadlock in its deliberations].) A court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness. [Citations.]" (*People v. Rodriguez, supra*, 42 Cal.3d at p. 768.) Further, " 'a judge may restrict his comments to portions of the evidence or to the credibility of a single witness and need not sum up all the testimony, both favorable and unfavorable. [Citations.]' [Citation.]" (*Id*. at p. 773.)

Although a more detailed summary would have included Nguyen's testimony on cross-examination that appellant's fingerprints were not found on the Pontiac or the cell phone, the fact that the court chose to single out other testimony for particular emphasis did not render its comments improper. The court did not comment on appellant's innocence or guilt, nor did it direct the jury to reach a certain verdict, or any verdict.

Further, even if the court erred in not including Nguyen's cross-examination testimony in its summary, any error was harmless, as the court also stated, accurately, that "there's an absence of evidence from either an evidence technician or an expert regarding fingerprints or lack of fingerprints on [the Pontiac or the cell phone]." In fact, this statement responded directly to the jury's question as to whether it could hear expert testimony regarding the absence of prints. The court also stated that it was up to the jury to draw its own conclusions about the "absence of . . . evidence." We therefore disagree with appellant that the court's statements led "juror[s] harboring a reasonable doubt . . . to believe[] the court was instructing the jury not to take lack of evidence into account . . . ." We also note there was ample other evidence from which the jury could find appellant guilty. Catone "immediately" identified appellant in a photo lineup. There was testimony that the stolen cell phone was seen in appellant's room, near his keys. Williams testified that appellant told her to say the phone was hers. Appellant's alibi was

inconsistent with records of the storage facility into which he claimed he was moving his belongings on August 29, 2008.[5]

DISPOSITION

The judgment is affirmed.

_____
McGuiness, P.J.

We concur:

_____
Siggins, J.

_____
Jenkins, J.

[5] Appellant contends, "should this Court find the claim is not preserved for review, then appellant has been denied the effective assistance of counsel." In order to prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, i.e., fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Having concluded there was no error, or that any error was harmless, we also conclude that any objection to the court's statements would have been futile. "Trial counsel is not required to make futile objections, advance meritless arguments or undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel. [Citation.]" (*People v. Jones* (1979) 96 Cal.App.3d 820, 827.) Appellant has not demonstrated that counsel's performance fell below an objective standard of reasonableness, and his claim of ineffective assistance of counsel fails.